

ISSUES

The Administrative Law Judge (ALJ) found the date of accident in this case to be March 27, 2004. The ALJ split the ratings of Dr. Edward Prostic and Dr. Vito Carabetta and awarded claimant a 17 percent permanent partial impairment to the body as a whole.

Respondent requests review of the ALJ's award, arguing that the report of Dr. Carabetta was more credible than the testimony of Dr. Prostic because Dr. Carabetta showed a superior grasp of the rating requirements of the *AMA Guides* and because Dr. Prostic's report missed vital information in the form of a second EMG of claimant that showed resolution of his radiculopathy. Although respondent raised the date of accident as an issue in its Notice of Appeal to the Board of Appeals, respondent's Board of Appeals Brief lists only nature and extent of injury as an issue. Respondent's initial brief is silent as to the date or dates of claimant's accident and injuries. In its Reply Brief, respondent argues that "there is no second injury or injury date."¹

Claimant objects to respondent's attempt to offer evidence in this matter by attaching portions of the *AMA Guides*² to its brief to the Board. Claimant also argues that claimant suffered a second accident in January 2005 and that his benefits should be calculated based upon an accident date of January 2005 instead of January 27, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a mechanic, although at times he would perform other jobs. On January 27, 2004, he was called out to haul trash. As he began to push a trash can, he slipped on some ice. As he slipped, he went down to his knees with his arms outstretched. At the time, he thought he had pulled a muscle. He continued to have problems, and three days later he decided to tell his foreman about his injury. He was referred to Tom Steck, who gave him some Ibuprofen.

About two months later, claimant tried to pick up a power take off (PTO), and it fell on him. He crawled from underneath the truck he was working on and called Mr. Steck. Claimant testified that between the time he fell on the ice and the time the PTO fell on him,

¹ Respondent's Reply Brief filed Sept. 1, 2006, at 5.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

he was hurting every day. However, other than taking Ibuprofen, he had no medical treatment from January 27, 2004, and the time the PTO fell on him. After the PTO fell on claimant, he went to the occupational clinic. There, he was put in therapy for a month and then was sent to see Dr. E. Bruce Toby.

Claimant complained to Dr. Toby about pain in his neck and shoulder. Dr. Toby performed surgery on claimant's left shoulder on October 14, 2004. Claimant was off work after the surgery until he was released by Dr. Toby in January 2005 to light duty with no lifting over five pounds. Claimant was sent to work in the recycle building at respondent.

While working in the recycle building, claimant sorted trash by slinging it back and forth into trash bins. At one point when he twisted, he felt a pain in his arm and neck. He reported the injury to Mr. Steck and was sent back to Dr. Toby. Claimant said that Dr. Toby told him he had a second injury. Dr. Toby performed a second surgery in May 2005 to make sure claimant had not pulled out the muscle attached in the previous surgery. That surgery established that no additional repairs were necessary.

Claimant still complains of a sharp pain in the left side of his neck. The pain goes down his left side, across the back of his neck, and down to his shoulders. His left hand is numb. Claimant opined that he has only 30 percent of his strength in his left hand as compared to his right. He has no grip and cannot hold onto a screwdriver or pick up truck parts with his left hand. He also cannot lift his left arm above his head, but can lift it only to shoulder level. Claimant stated that he did not think there was any more that can be done for him medically.

Dr. Prostic, a board certified orthopedic surgeon, examined claimant on October 11, 2005, at the request of claimant's attorney. He reviewed claimant's medical records and took a history from claimant. Dr. Prostic's report noted that claimant had surgery in October 2004 to repair a Type II superior labrum anterior and posterior (SLAP) lesion of the glenoid labrum, an injury where the long head of the biceps attaches to the superior portion of the glenoid. Claimant reported he had an aggravation of this injury in January 2005. A second surgery was performed, at which time no additional repair was required. However, Dr. Prostic testified that since the aggravation was significant enough to require a second surgery, it would be considered a second traumatic event.

Upon examination of claimant's cervical spine, Dr. Prostic found tenderness in claimant's lower cervical segments posteriorly on the left. Range of motion was satisfactory except for left tilt, which was restricted to 25 degrees. This tilt indicated about one-third loss of tilt to that side, which is consistent with a cervical trauma. Axial and shoulder compression tests were negative, as was Spurling's maneuver. There was no periscapular tenderness or spasm. Dr. Prostic found reproduction of radicular symptoms by repetitious clenching of the fist in the position of the Adson maneuver and worsening with downward and backward traction on the left arm. In examining claimant's left

shoulder, Dr. Prostin found a one-inch decrease in circumference of the left upper arm, which was indicative of significant atrophy subsequent to the shoulder injury and surgery. No heat, swelling, or erythema was noted. Range of motion was reluctant but complete. No crepitus was noted. There was weakness of external rotation. Impingement signs were negative, and there was no obvious instability.

Dr. Prostin noted that claimant had been operated on twice for a SLAP lesion and had an EMG that showed evidence of C6 radiculopathy and cubital tunnel syndrome. He stated that claimant's examination was consistent with thoracic outlet syndrome, which is trapping of the brachial plexus between the anterior and middle scalene muscles above the first rib. Dr. Prostin testified that "this [is] probably a shoulder thing rather than a cervical problem, but anatomically I think it's closer to the neck than the shoulder."³ He opined that based on the *AMA Guides*, claimant had a 15 percent permanent partial impairment to the body as a whole for the EMG-proven radiculopathy and 15 percent permanent partial impairment of the left upper extremity, which combined for a 23 percent permanent partial impairment to the body as a whole.

Dr. Carabetta performed an independent medical examination of claimant on January 24, 2006, at the request of the ALJ. Dr. Carabetta reviewed claimant's medical records and noted that electrodiagnostic studies performed by Dr. George Varghese on July 28, 2004, showed "some subtle findings suggestive of a possible C6 radiculopathy"⁴ Dr. Carabetta also noted that electrodiagnostic studies performed on July 11, 2005, were normal, with "resolution of any minor radicular findings that were identified previously."⁵ Examination of claimant's cervical spine found it to be within the normal ranges. Dr. Carabetta found mild bilateral upper trapezius muscle spasm but no muscle atrophy in claimant's upper extremities. Dr. Carabetta diagnosed claimant with status-post left shoulder arthroscopy and chronic cervical sprain.

In rating claimant, Dr. Carabetta stated: "I would remind all parties concerned that the degree of residual permanent partial impairment is determined based upon what remains when the process is complete, rather than what may have potentially been identified early on, and subsequently improved or resolved."⁶ Using the diagnosis related estimates model in the *AMA Guides*, Dr. Carabetta found claimant had a Category II presentation with a 5 percent permanent partial impairment to the body as a whole as relates to his cervical spine. For his left upper extremity, Dr. Carabetta opined claimant

³ Prostin Depo. at 15.

⁴ IME report of Dr. Vito Carabetta dated January 24, 2006, filed January 26, 2006, at 1.

⁵ *Id.* at 2.

⁶ *Id.* at 3.

had a 10 percent permanent partial impairment, which converted to a 6 percent whole person impairment. Using the Combined Values Chart, Dr. Carabetta found claimant had an 11 percent permanent partial impairment to the body as a whole.

The ALJ treated claimant's injuries and resulting disability as a single March 27, 2004, accident. Respondent apparently agrees with the ALJ's conclusion in this regard. Claimant, however, argues that he suffered two separate and distinct accidental injuries, the first on January 27, 2004, and a second in January 2005. But claimant does not differentiate between the injuries suffered in these two accidents, nor does claimant separate the impairments or resulting percentages of disability. The 2005 incident was to the same part of the body as the January and March 2004 accidents. The ALJ determined that the March 2004 incident was the most significant injury. The Board agrees. The January 2005 aggravation was temporary and did not result in any additional permanent impairment. Accordingly, the Board affirms the ALJ's finding of a March 27, 2004, accident date.

As for the nature and extent of claimant's disability, both expert medical opinions were presented as being pursuant to the 4th edition of the *AMA Guides*. The Board will not go outside the record to ascertain whether one or both of these opinions may have varied from or misapplied the *Guides*. The Board will not consider the pages attached to respondent's brief, which are purported to be excerpts from those *Guides*. The Board is limited to considering only the record presented to the ALJ.⁷ Based upon that record, the Board agrees that both Dr. Prostic's and Dr. Carabetta's opinions are credible and should be given approximately equal weight. The ALJ's finding that claimant suffered a 17 percent permanent partial disability is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 12, 2006, is affirmed.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

⁷ K.S.A. 44-555c(a); see *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, rev. denied 263 Kan. 885 (1997).

Dated this _____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
 Steven C. Alberg, Attorney for Respondent and its Insurance Carrier